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In the Supreme Court of the United States

OCTOBER TERM 1958

No. 763

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

THE CORPORATION COMMISSION OF ARIZONA, and WILLIAM T. BROOKS, JOHN H. BARRY and MIT SIMMS, as members of and comprising said Commission, and THE CITY OF TUCSON, a municipal corporation,

Appellees.

Appeal from the Supreme Court of the State of Arizona

Statement as to Jurisdiction

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Appellees.

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Statement as to Jurisdiction

(a) OPINIONS IN THE COURTS BELOW.

The Supreme Court of the State of Arizona rendered an opinion in this cause, which is reported at 84 Ariz. 365, 329 P.2d 883. A copy of the opinion is attached as Appendix A. The order of the Supreme Court of Arizona denying appellant's petition for rehearing is not reported.

The Superior Court of Arizona rendered no opinion herein. The judgment of said Superior Court is reproduced as Appendix B.

The Arizona Corporation Commission (hereinafter referred to as "the Commission") rendered a decision (not officially reported) embodying its opinion and order in this cause. A copy of this decision is attached as Appendix C.

(b) GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) This proceeding is in the nature of an appeal from a final judgment of the Supreme Court of Arizona, affirming a judgment of the Superior Court of that State, which in turn affirmed a decision of the Commission directing and requiring appellant at its own sole cost and expense to install and maintain signal protection (i.e., flashing lights) at the location where South Cherry Avenue, a public roadway in the City of Tucson, Arizona, has been constructed across appellant's main line of railroad.

The suit in the Superior Court of Arizona, challenging the Commission's decision, was brought pursuant to Section 40-254, Arizona Revised Statutes Annotated. The appeal to the Supreme Court of Arizona was taken pursuant to Section 12-2101-B, Arizona Revised Statutes Annotated. The Supreme Court of Arizona is the highest court of that state, and the highest court in which a final judgment may be had in an action such as the present: *Arizona Constitution*, Article VI, Sections 1, 3.

(ii) The final judgment of the Supreme Court of Arizona was entered on September 24, 1958, and the order of said Court denying appellant's petition for rehearing was entered on October 21, 1958. The notice of appeal herein was filed on December 19, 1958, with the Clerk of the Superior

Court of Arizona, in and for the County of Maricopa, the "court possessed of the record".

(iii) The jurisdiction of the Supreme Court to review the judgment by appeal is conferred by Title 28, U.S. Code, Section 1257(2), in that there is here drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution and laws of the United States, and the decision of the highest court of the state has been in favor of its validity.

(iv) The state action, the validity of which is involved upon this appeal, is contained in the decision of the Commission summarized above. This Court has held that:

> "Such an order, being legislative in nature and made by an instrumentality of the state is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction."
>
> *Lake Erie & W.R.R. v. Public Util. Comm'n*, 249 U.S. 422, 424 (1919);
>
> *Kansas C.S. Ry. v. Road Improvement Dist.*, 256 U.S. 658, 659-660 (1921);
>
> *Live Oak Water Users Ass'n v. Railroad Comm'n of Calif.*, 269 U.S. 354, 356 (1926);
>
> *Hamilton v. Regents*, 293 U.S. 245, 258 (1934);
>
> *Atchison, T. & S.F. Ry. v. Public Util. Comm'n*, 346 U.S. 346, 348-349 (1953).

(v) The statute of the State of Arizona upon which the Commission's decision purportedly rests is Section 40-336, Ariz. Rev. Stat. Ann. (formerly Section 69-228, Arizona Code Annotated, 1939), reading as follows:

> "40-336. *Power of Commission to require safety devices.*
>
> The commission may by order, rule or regulation, require every public service corporation to maintain

and operate its line, plant, system, equipment, and premises in a manner which will promote and safeguard the health and safety of its employees, passengers, customers and the public, and may prescribe the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signalling, establish uniform or other standards of equipment, and require the performance of any other act which health or safety requires."

(c) QUESTIONS PRESENTED BY THIS APPEAL.

The essential questions presented by this appeal are whether, in the light of the Due-process and Equal-protection Clauses of the Fourteenth Amendment to, and the Commerce Clause of, the Constitution of the United States, a state regulatory tribunal purporting to act under authority of a state statute may validly order the appellant, an interstate railroad, to pay and bear the entire cost of installing and maintaining additional signal protection (i.e., flashing lights) at a rail-highway grade crossing: when it appears, and is not disputed, that: (1) the roadway was built, and extended across the tracks, some 40 years after the railroad had been constructed in its present location; (2) the crossing at the time of the order was protected by reflectorized permanent signs, overhead lights, and advance warning signs, on both the roadway and at the roadside; (3) the hazards at the crossing are slight, and such as exist are due primarily to causes other than appellant's operations of trains and engines; (4) the additional protection ordered is for the primary purpose of avoiding or minimizing delays to and interferences with vehicular traffic on the roadway, rather than for safety; (5) interferences with visual observation by drivers of vehicles approaching the

crossing are due to the presence of structures on private property not controlled by appellant, and not to any act or omission chargeable to appellant; (6) the number of roadway vehicles passing over the crossing each day is substantial, and is tending to increase, whereas the number of railroad movements (trains or engines) is very much smaller, and if anything is tending to decline; (7) appellant's operations interfere only infrequently with the free movement of roadway vehicles over the crossing; (8) installation of the proposed flashing signals is admittedly for the sole and substantial benefit of the vehicular traffic using the roadway, and of no benefit whatever to appellant; (9) the Commission, and likewise the Superior Court and the Supreme Court of Arizona, wholly refused to consider or give any weight to the foregoing or any other special facts, conditions or circumstances, bearing upon the fair and reasonable allocation of the expense of the added protection, and instead decided and declared that under the state statute held applicable here (Section 40-336, A.R.S., quoted *supra*) neither the Commission nor any Court or other tribunal of Arizona has any power in this or any like proceeding to consider such special facts or circumstances, for the purpose of making any apportionment of said expense, or to make any such apportionment to any party in interest other than the railroad, or to require any such party (other than the railroad) to contribute to or bear any share of said expense.

(d) STATEMENT OF THE CASE.

Appellant Southern Pacific Company is an interstate common carrier by rail. The lines comprising its system are located in nine of the Western and Southwestern states, and extend from New Orleans, Louisiana, westward across

Texas, New Mexico, Arizona and California to Los Angeles, and thence by two main routes northward to San Francisco and Portland, Oregon, with a line extending eastward across California and Nevada to Ogden, Utah. The total road mileage of appellant's system is more than 12,350.

As shown by this Court's opinion in *United States v. Union Pacific R. Co.*, 226 U.S. 61, 80 (1912), ever since about 1884 appellant has maintained and operated a railroad line between Los Angeles and New Orleans. At a point near the present easterly boundary of the City of Tucson, Arizona, this line, which is built on a private right of way acquired prior to 1884, is crossed by a street now known as South Cherry Avenue. A two-lane graveled roadway was first opened across the tracks at this location, about 1925. No easement or other right to cross the right of way was then requested from or granted by appellant, and formal authority for the crossing was not obtained until 1956, in the course of this proceeding. At all times the crossing has been at grade. Protection of traffic on the roadway has been afforded by warning signs, including reflectorized crossbuck signs, and warning lights adjacent to the crossing, reflectorized signs on each side of the roadway, about 150 feet in advance of the crossing, and painted signs on the pavement.

For many years Cherry Avenue was merely a country road carrying but little traffic, and no warning signals were required or provided other than the usual standard crossbuck signs. Incident to the development of industrial construction and residential housing in the areas adjoining Tucson on the east, about 1954 Cherry Avenue was widened and paved, and thereupon began to carry more vehicular traffic. A check of the crossing made in May, 1956, the month preceding the Commission's hearing herein, showed that the daily movement of vehicles of all types over the

crossing ranged from 3341 to 6041, and averaged 5329 per day. A similar check made in May, 1953, had indicated that the daily average was then 3252. Cherry Avenue is one of several through north-and-south streets in the easterly part of Tucson, which cross appellant's main line and provide routes over which motor vehicles pass between the northern and southern portions of the city. The authorized or "legal" speed for highway vehicles at the crossing is 35 m.p.h.

In contrast, the volume of train movements over the crossing does not appear to have increased in recent years. There were, at the time of the hearing, eight* regular daily passenger trains, and from 23 to 35 freight train movements per day; in addition, there were from eight to thirteen daily yard-switching movements. The maximum speed for train movements over the crossing is 20 m.p.h.

Cherry Avenue is straight and level (except for a slight rise at the crossing) for considerable distances, not less than 660 feet, on each side of the crossing. Motorists approaching the crossing from the south, upon arriving at a point 60 feet distant, have an unobstructed view of the crossing itself, and the tracks on both sides for distances of at least 500 feet. Motorists approaching from the north also have a clear view of the tracks in either direction, when they reach a point about 60 feet from the crossing; but their view at greater distances is interfered with to some extent by structures located on both sides of the roadway north of the tracks, upon private property not owned nor controlled by the appellant railroad.

On March 26, 1955, the City of Tucson filed with the Commission a complaint seeking an order requiring appellant to install automatic flashing lights at the Cherry Avenue

*At present there are only six regular daily passenger trains. Movements of freight trains have also declined in about the same proportion.

crossing, and alleging that because of the widening and paving of Cherry Avenue in 1954, and the growth and development in the areas served by that street, the added protection was needed in order "to meet the needs and convenience of the public and to safeguard the health and safety of the public using said grade crossing."

Appellant duly filed its answer to the complaint, in which it denied that the automatic protection was needed, and also asserted that if it were ordered to be installed, the cost should be met by the City.

The complaint came on for hearing before the Commission on June 15, 1956, at which time evidence, both oral and documentary, was received, and the matter was submitted. On July 20, 1956, the Commission issued its Decision No. 29784 (Appendix C, *infra*), in substance stating that after reviewing the evidence it was of the opinion that the installation of flashing lights at the crossing would promote and safeguard the health and safety of appellant's employees, passengers, customers and the public; and ordered such protection to be installed and maintained "at the sole expense of the" appellant. It may be noted that the Commission failed to find expressly that the crossing was hazardous, or that, if hazardous, such condition was due to any act or omission of appellant.

Appellant duly filed with the Commission a petition for rehearing of Decision No. 29784, in which (in addition to alleging that the added protection was not shown to be needed) appellant asserted that the imposition upon it of the entire cost of the installation would be unreasonable, arbitrary, and inequitable, in violation of not only the Arizona Constitution and statutes, but also the Commerce Clause of, and the Due-process and Equal-protection Clauses of the Fourteenth Amendment to, the United States Constitution, and the Interstate Commerce Act, particu-

larly the National Transportation Policy, and Section 1 of said Act.

Appellant's petition on rehearing was denied by the Commission on September 6, 1956, in and by its amended opinion and order, styled Decision No. 29842, a copy of which is annexed as Appendix D.

Following the Commission's denial of rehearing, appellant on October 24, 1956, brought the action heretofore referred to, in the Superior Court of Arizona, in and for Maricopa County, challenging the Commission's Decision No. 29784 (as affirmed by its denial of rehearing) and praying that it be vacated and set aside. In its complaint in the Superior Court appellant again asserted the same grounds of invalidity which had been set forth in its petition to the Commission seeking rehearing.

The case in the Superior Court was tried on February 19, 1957, the City of Tucson appearing as an intervenor in opposition to the plaintiff-appellant. The record made at the hearing before the Commission was introduced, and certain additional evidence was received. The case was then submitted on briefs.

In the plaintiff-appellant's memorandum brief, the specific contention was advanced that in allocating the entire expense to appellant, the Commission had acted arbitrarily and unreasonably, in that it had failed and refused to consider the relevant facts bearing upon such allocation. In this behalf, reference was made to a number of the leading decisions of this Court, including in particular:

Nashville, C. & St. L. Ry. Co. v. Walters, 294 U.S. 405 (1935);

Atchison, T. & S.F. Ry. Co. v. Public Utilities Comm'n, 346 U.S. 346 (1953).

The Superior Court on April 22, 1957, rendered its judgment (Appendix B) affirming the Commission's decision.

The court did not hand down an opinion, nor make any special findings of fact or conclusions of law. It would appear, however, that insofar as concerned the question of allocation, both the Commission's decision and the Superior Court's judgment were strongly influenced, if not controlled, by the expressions of the Supreme Court of Arizona in its opinion in *Maricopa County v. Arizona Corporation Comm'n*, 79 Ariz. 307, 289 P.2d 183 (1955). Since that case may thus be regarded as a "companion" to the case at bar, a copy of the opinion is annexed as Appendix E.

In that opinion the Supreme Court of Arizona held that the state statute above quoted (Section 69-228, Arizona Code Annotated, 1939, now re-enacted as Section 40-336, Ariz. Rev. Stat. Ann.) not only empowers the Commission to require the installation of protective devices at grade crossings, but also requires that the railroad bear all the expense, and provides that no portion of such expense shall be apportioned to any other party. A judgment of the Superior Court of Arizona, which had affirmed an order of the Commission allocating such expense equally to the railroad and to Maricopa County, was accordingly reversed.

The appeal from the judgment of the Superior Court in the instant case was duly taken by appellant to the Supreme Court of Arizona, and the case was briefed and orally argued before that Court. The opinion affirming the judgment of the Superior Court (Appendix A, *infra*) was rendered on September 24, 1958; and a petition for rehearing filed by appellant was denied (without opinion) on October 21, 1958. The mandate to the Superior Court was issued by the Supreme Court of Arizona on October 23, 1958. The notice of appeal to this Court was duly filed on December 19, 1958.

In the opinion in the case at bar the Supreme Court of Arizona referred at length to not only the *Maricopa County*

case (79 Ariz. 307, 289 P.2d 183, *supra*), but also *Southern Pac. Co. v. Arizona Corp. Comm'n*, 83 Ariz. 333, 321 P.2d 224 (1958). In the latter the factual situation in the *Maricopa County* case was again considered. Since the *Southern Pacific* opinion is also a "companion" to the present case, a copy is annexed as Appendix F. Especial attention is called to the following expressions of the Supreme Court of Arizona in this later opinion, in which the state statute here involved is referred to (321 P.2d, p. 227):

> "The company contends that if our interpretation of section 69-228, supra, be correct, the section is unconstitutional, the theory being that the legislature cannot impose the entire cost of signalling devices upon the company for the reason that to do so would be unreasonable and especially so since the commission has found that the company and Maricopa County would benefit in equal proportions and that it was reasonable and equitable under the circumstances that each pay half the cost. The mere fact the statute imposes the entire cost upon the company does not infringe upon constitutional rights. The police power of the state may be so exercised." (citing cases)
>
> "Much emphasis is placed upon the proposition that since the commission found that the county received equal benefits and it is reasonable that it contribute equally to the costs, the order by reason of this finding is ipso facto unreasonable and thereby drawn into the sphere of unconstitutionai law. We are not impressed with this argument when *the statute gives the commission no power to allocate a portion of the costs to the county. When because of local conditions public safety requires certain safety measures, the relative benefit to the public and the railroad company is neither a circumstance nor a factor to be considered* in determining the reasonableness of the order. * * * *The statute in effect says that* under such conditions *it is reasonable to require the company to pay all and the commission*

cannot find to the contrary. The controlling factors are local safety and necessity." (Emphasis added.)

* * * * * * *

The foregoing recital shows that the essential federal questions presented by this appeal were specifically presented and urged: initially in appellant's petition for rehearing addressed to the Commission's first decision herein (although appellant, in answering the original "complaint" of the City of Tucson had asserted that the Commission could not lawfully establish the crossing without properly allocating the cost); thereafter in appellant's complaint in the Superior Court, seeking to have the Commission's decision set aside; and finally in brief and argument, upon appeal to the Supreme Court of Arizona. The following summary of appellant's contentions appears in the opinion of the State Supreme Court in this cause:

> "In its appeal to this Court Southern Pacific contends that the trial court erred in affirming the Commission's order because: (1) the South Cherry Avenue crossing does not create a hazardous condition dangerous to the health and safety of the public; (2) the hazard, if any, at the crossing does not result from acts of the Southern Pacific Company; (3) the Commission did not apportion the cost of the protective devices under the provisions of A.R.S. § 40-337; and (4) *an interpretation of A.R.S. §§ 40-336 and 40-337 which places the entire cost of crossing protection on the railroad without reference to the reasonableness thereof makes them unconstitutional and creates an unreasonable burden on interstate commerce.*" (329 P.2d, p. 884; Emphasis added.)

Finally, the same questions were duly presented and argued to the Supreme Court of Arizona, by appellant's petition for rehearing addressed to that court.

The federal questions have thus been raised and urged at all stages of the proceedings, leading up to the final action of the Supreme Court of Arizona embodied in the judgment from which this appeal is taken. That court's final action consisted of its opinion (Appendix A), its order denying appellant's petition for rehearing, and its mandate directed to the Superior Court, advising that court of the affirmance of the judgment rendered April 22, 1957. The action of the Supreme Court of Arizona constituted a final judgment on the merits, within the meaning of the statutes governing the appellate jurisdiction of this Court.

(e) THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

It may be said, in a general way, that the circumstances presented in this case are neither unique nor unusual. There have been many proceedings involving the installation of signal protection at railroad-highway grade crossings in which, as here, the principal, if not the sole, issue in dispute had to do with the allocation of costs as between the railroad and the other parties in interest, usually the state or municipal authorities responsible for constructing and maintaining the roadway. With the constant increase in the volume of automotive traffic, especially the larger commercial vehicles handling intercity commerce, it is to be expected that more and more demands will be made for elaborate signal protection at rail-highway crossings, and as the highway traffic increases further, for grade separations: all in the interest of avoiding or reducing crossing delay.

Thus the question of the proper standards to be observed in allocating the costs of installation and maintenance presents a constitutional issue of outstanding public importance. No matter how urgent the demand, the actual de-

termination whether, in a given situation, such protection shall be installed invariably depends in the last analysis upon the availability of funds and thus, in turn, upon the contributions which can be exacted, under persuasion or compulsion, from the various interests involved.

This case is, however, distinctive, if not unique, in at least one respect: the repeated and persistent refusal of the Supreme Court of Arizona to be guided by the constitutional principles so clearly stated by this Court in the *Nashville* case, *supra*, and again affirmed and applied in the more recent *Atchison* case. In *Nashville* this Court reversed a decree of the Supreme Court of Tennessee, approving an arbitrary imposition of grade-separation costs upon the railroad, made pursuant to a state statute which in terms required, irrespective of the relevant special facts, that in every instance the railroad pay one-half of the cost. In *Atchison* this Court approved allocations against the railroads involved of one-half of the costs of grade-separation projects, where it was shown to the satisfaction of this Court that the state Commission, acting pursuant to state statute, had given full consideration to all of the relevant facts, and had fairly determined therefrom that the allocation in question was proper.

In the case at bar, on the other hand, the court below, following its earlier pronouncement in the *Maricopa County* and *Southern Pacific Company* cases, *supra* (in which no final judgment has so far been rendered), has construed the state statute as providing that the *entire cost* of crossing protection *must* be imposed upon the railroad, holding (as did the Supreme Court of Tennessee, in the *Nashville* case) that neither the Commission, nor the court of first instance, is required or empowered to consider any special facts which might warrant any other allocation and,

indeed, is prohibited from so doing; this because of its conclusion that the applicable statute does not contemplate any apportionment of the cost against any interested party, other than the railroad. In effect the court below has said that, in a proceeding involving grade-crossing protection, the only question which the statute permits to be considered is whether the crossing is "hazardous". If on the record the Commission so concludes, no other factor or circumstance should or can be considered; for (says the court) the state statute then requires the railroad to install the added protection at its own sole cost, "and the Commission cannot find to the contrary". Since any grade crossing involves at least some "hazard", the implications of the State Court's holding are virtually unlimited.

1. The historical background.

The crossing of railroads and public roadways at grade has been a basic characteristic of these two forms of land transportation ever since the railroads were first built. These crossings were unavoidable, for the railroads could not have been constructed if elimination of all grade crossings had been required. The necessary funds were not and could not have been made available, for the rail traffic at the time was not sufficient to justify the added expenditure. If rail charges had been made sufficiently high to obtain the moneys necessary for the purpose, the result would have been to price the railroad service out of the transportation market. Consequently, and for many years, grade crossings were accepted as a necessary incident of the existence of the indispensable railroad transportation system.

Up to about the year 1900, there were few, if any, highways used for through transportation. The grade crossings at which the movements of trains constituted a hindrance

to roadway traffic were mainly in the cities. Consequently, the demands for grade crossing improvements arose mostly in cities, and were based upon the hazards created by the frequent passage of trains over crossings used by horse-drawn traffic. As rail traffic increased, and railroad trains were operated at higher speeds as well as more frequently, these demands for greater protection became more insistent, but considerations of public safety were in nearly all instances the entire basis of the demands.

During the period following 1900 substantial changes occurred, which greatly modified the essential elements bearing upon the existence, use and protection of grade crossings. During the twenty years, 1900-1920, the population of the United States increased by 40%, the urban population increased by an even larger proportion, about 8 million more motor vehicles were placed in use, railroad track mileage was increased by about 60%, and the mileage of rural hard surfaced roads increased from less than 150,000 miles to nearly 400,000. Thus there was brought about a tremendous increase in the number of rail-highway grade crossings.

Even prior to 1900, and more especially in the two decades following, there was also continuing consideration of the question of responsibility for providing safeguards at grade crossings. Since in this earlier period safety was the prime consideration, it was argued, generally with success, that the railroad operations were the principal source of the hazards and therefore the railroads should provide the needed protection, or even in proper cases should replace the crossings with grade separations. Compare:

Chicago, B. & Q. Ry. Co. v. Chicago, 166 U.S. 226, 251-255 (1897);

Cincinnati, I. & W. R. Co. v. Connersville, 218 U.S. 336, 343-344 (1910);

Missouri P. R. Co. v. Omaha, 235 U.S. 121, 127 (1914);

Erie Railroad Co. v. Board of Public Utility Comrs., 254 U.S. 394, 410-411 (1920).

Following 1920, and continuing to the present day, the nation's system of hard surfaced roads has been expanded into the vast network which now reaches every part of the country. By 1935, the highway mileage had increased to approximately 3,000,000, and today that figure is practically doubled. During this same period the automobile and the motor truck have been developed into dependable means of transportation, now relied upon as the principal, and for many purposes as the sole, means of transportation used by business and industry. Motor vehicle registration increased from about 55,000 in 1904, to 26,000,000 in 1935, and to more than 50,000,000 today. The increased population of the country, and especially the much greater increase in urban population as related to the total, has brought about greatly increased use of roads and highways both within and between metropolitan centers. This has resulted in increased demands for improved grade crossing protection, based primarily, however, upon the factor of public convenience rather than solely upon safety.

As of the present day, and indeed, ever since the early 30's, the railroads have been fairly well established in their present locations. Except for the infrequent building of a new short line, or new industrial spurs and leads, the primary cause of increases in the numbers of rail-highway grade crossings has been the establishment of new or extended streets and highways across existing railroad tracks. At the same time the demand for improved crossing protection has been reinforced by the constant increases in the volume of traffic on these streets and highways.

Additional factors which have contributed to the grade crossing problem are: (1) the trend toward the decentralization of industry, with the consequent need for added highway facilities, and (2) the growth of suburban communities. These factors have magnified the importance of grade-crossing protection, as a matter of public convenience and the avoidance of delays to automobile traffic, with safety considerations of relatively negligible importance.

2. The Nashville case.

The revolutionary changes in the factors affecting the grade crossing problem were before this Court, and received its extended consideration, in the *Nashville* case: *Nashville C. & St. L. Railway v. Walters,* 294 U.S. 405 (1935). That case involved the validity of an assessment for a grade separation, imposed pursuant to a Tennessee statute providing that in all such cases the railroad involved should contribute one-half of the overall cost. The railroad challenged the assessment, on the ground that substantial and material changes had taken place, so that the considerations which previously had been held to justify such impositions were no longer controlling. The case had been tried in a lower court of the State, where, upon consideration of the extensive evidence introduced by the railroad, the assessment had been held invalid. The State Supreme Court refused, however, to consider the railroad's showing of special facts, holding instead that the State statute, and the action taken by the State Commission thereunder, were valid because undertaken "to promote the safety of persons traveling on the highways", as well as "to promote the safety of persons traveling on the railroads"; and that the railroad's evidence was therefore without legal significance. Upon appeal, this Court reversed the judgment of the State Court.

The detailed opinion, rendered by Mr. Justice Brandeis, characterized the recent developments in the relation between rail and highway transportation as "the *revolutionary change* incident to transportation wrought in recent years by the widespread introduction of motor vehicles".* On the basis of this sweeping development, he stated two major conclusions: (1) grade separations are no longer constructed primarily for reasons of safety, for the railroad has ceased to be the main cause of accidents; they are now essentially economic improvements designed to further the "uninterrupted, rapid movement by motor vehicles", and are comparable to widening the highway, removing curves, shortening distances, etc.; (2) the competitive position of the railroads, as against trucks, buses, and other users of the highways, has changed radically in recent years. The opinion states: "Separation of grades serves to intensify the motor competition and to further deplete rail traffic" (p. 423).

Thus, to require a railroad to bear an arbitrary apportionment of the cost of a grade crossing improvement or, as in the case at bar, the entire expense without any consideration of the relevant facts and circumstances, is to

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*Only two years later, and shortly after it was given regulatory power over the transportation of property by motor carriers the Interstate Commerce Commission reported to the Congress as follows:

"Whether it realizes it or not, the country has in fact experienced *a transportation revolution* in a very short space of time. The automotive highway vehicle has been the principal factor in this revolution. In the carriage of persons, it is now by far the most important means of transportation, and in the carriage of property it is growing in importance every day." 52 Annual Report of ICC (1938), p. 17.

Earlier the Commission had said:

"Competition of the bus and truck is a development of recent years, but it is the most formidable which confronts the railroads." 45 Annual Report (1931), p. 98.

force it to provide for the benefit and convenience of others who may be, in many instances, its aggressive competitors.

Having thus concluded that there had occurred a substantial reversal of the positions and interests of the parties concerned in grade crossing improvements, this Court held that a mere arbitrary assessment of half the cost of such an improvement could not be sustained against a claim of lack of due process. The fundamental error of the State Court in upholding such an arbitrary assessment was described by this Court in the following language:

> "The Supreme Court of Tennessee did not consider whether, in view of the facts relied upon, it was arbitrary and unreasonable to impose upon the Railway one-half the cost of the underpass. It assumed that the State action was valid because it found that the action was taken 'to promote the safety of persons traveling the highways at grade crossings as well as to promote the safety of persons traveling the railroads at such crossings * * *'." (294 U.S., p. 432)

3. The Atchison case.

The basic principle of the *Nashville* case was affirmed and applied by this Court in two cases involving very similar facts, which were considered by the Court together, and covered by a single opinion, generally cited as: *Atchison, Topeka and Santa Fe Railway Company v. Public Utilities Commission of California,* 346 U.S. 346 (1953).

The two cases involved the validity of orders of the California Public Utilities Commission, requiring the railroads to contribute one-half of the cost of enlarging a grade separation (in one case), or constructing such a separation (in the other), at locations where city streets crossed their respective rights of way. As the opinion shows, the railroads had contended that in allocating the costs of these

improvements the State Commission should be guided by the so-called "benefit" principle; that is, that the contributions of the railroads should not be greater than the benefits which would accrue to them from the improvements. However, the Commission had concluded that it was not bound to make the allocations on the basis of benefits alone and, after consideration of all of the facts shown of record in the proceedings before it, had held that the cost should be allocated equally to the railroads and the public authorities. The Commission's action had been upheld by the State Supreme Court, and these appeals had been taken from those final decisions.

This Court held that in cases of this character, where improvements of grade crossings are undertaken to meet public convenience and safety the entire cost *may be* allocated to the railroads, but that "there is the proper limitation that such allocations of costs must be fair and reasonable" (citing the *Nashville* case, *supra*) (346 U.S., p. 352). After analyzing the facts of the *Nashville* case at some length, this Court said further:

> "Thus, the contention of the railroad and the rule recognized by this Court in the Nashville opinion was that there could be an allocation of costs subject to the limitation that they be allocated always with regard to the rule against unreasonableness and arbitrariness * * *.
>
> "In our cases, * * * unlike the Supreme Court of Tennessee, which refused to consider the facts to determine whether the statute's allocation of 50% was arbitrary or unreasonable, the California Commission considered all the evidence offered, including that pertaining to benefits received, and properly applied the rule of allocation sanctioned by this Court, and the California Supreme Court found no occasion to review the Commission's orders." (p. 354)

Thus this Court has held, in the *Nashville* case, that when a state statute (as construed by the highest court of the state) provides for an arbitrary and unchangeable allocation of the cost of improving a rail-highway grade crossing, and an order is made by a state agency based solely on that statute, and without consideration of relevant facts tending to show that the statutory allocation is not fair or reasonable, the order is invalid for lack of due process. This Court has further held, in the *Atchison* case, that every such allocation of the cost of a grade crossing improvement must conform to the rule of the *Nashville* case; that is, it must be fair and reasonable, and made only after due and proper consideration of all the evidence offered.

4. The action of the state authorities.

As previously stated, the Commission's action in the present case was unquestionably responsive to the views announced by the State Supreme Court in the *Maricopa County* case. In that opinion the Court had held that in a proceeding involving the installation of grade crossing protection, the Commission's authority was derived from § 69-228, Arizona Code Annotated (now Section 40-336, A.R.S.), that that statute required the Commission, upon finding that a grade crossing was hazardous, to order the railroad to install the protection forthwith, and that the statute did not confer upon the Commission any authority to apportion the expense between the railroad and the public representative (in that instance, Maricopa County). In the subsequent *Southern Pacific* case, which involved the same crossing, the State Court held that in imposing the entire expense upon the railroad company, and withholding from the Commission any power to allocate any portion thereof to others, regardless of the particular facts, the applicable

statute was not unconstitutional. In support of this conclusion the State Court in the *Southern Pacific* case cited two of the earlier decisions of this Court, previously referred to herein: *Erie R. Co. v. Board of Commissioners,* 254 U.S. 394 (1920); and *Missouri-Pacific R.R. Co. v. Omaha,* 235 U.S. 121 (1914); and also the *Atchison* case (346 U.S. 346). Notably, however, the Court did not cite the *Nashville* case, in either the *Maricopa County* opinion, or the subsequent *Southern Pacific* opinion; and it did not attempt in either opinion to distinguish the *Nashville* case, or otherwise to explain its failure to follow the principle laid down therein; this notwithstanding that in the *Atchison* case (upon which the State Court apparently relied) that principle was affirmed and applied to the situation then before the Court. There is likewise no reference to the *Nashville* decision in the opinion in the case at bar, nor any explanation by the Court of its failure to follow or in any event to distinguish that decision.

It is significant that the policy and practice heretofore followed by the Commission in proceedings involving grade-crossing protection has been to allocate the cost between the parties in interest, frequently one-half to the railroad and one-half to the county or city requesting the installation. Precisely such action was taken, for example, in the proceeding before the Commission which was reviewed in the *Maricopa County* case (see 79 Ariz., at p. 309; 289 P.2d, at p. 184); the Commission having concluded, after receiving evidence at a public hearing, that the railroad and the County would be equally benefited by the proposed protection and therefore should share equally in the cost.

In January, 1952, the Commission replied to a questionnaire circulated by the Public Utilities Commission of California, stating in such reply that: (1) it (the Arizona Commission) then had authority to apportion the cost of grade

crossing protection between the parties in interest; (2) the percentages assigned depended upon the location and need; and (3) in the only case then recently decided by the Commission (involving the City of Tempe and this appellant) the costs had been apportioned equally.

It thus appears that up to the time of the decision of the State Supreme Court in the *Maricopa County* case (October 31, 1955) the Commission had respected and adhered to the principles laid down by this Court in the *Nashville* case and affirmed in the *Atchison* case, and abandoned that course solely because it had no other choice in view of the *Maricopa County* decision. The decision of the Commission in the case at bar, which includes its opinion, contains no discussion of the evidence. In fact, the decision consists merely of a conclusion, framed in the language of § 40-336 A.R.S., the statute held applicable by the State Supreme Court, that the proposed protection "will promote and safeguard the health and safety of" appellant's "passengers, employees, customers and the public", and pointedly omits any finding that the present crossing is "hazardous".

The judgment of the Superior Court was rendered after a trial in which the evidence consisted principally of the record already made before the Commission. This judgment consists of nothing more than an affirmance of the Commission's decision and order, without any other findings or conclusions. Thus the Superior Court likewise made no finding that the crossing is hazardous.

The State Supreme Court in its opinion held that the matter as to whether costs of signalling devices at grade crossings shall be apportioned, or placed solely upon the railroad, is purely legislative: i.e., a matter over which the courts have no control. The Court therefore declined to consider or decide the essential questions: (1) whether the

imposition of the entire cost on the railroad was fair and reasonable in all the circumstances; and (2) whether the Commission and the Superior Court had erred in refusing to determine the fairness and reasonableness of that allocation. Instead, the Court limited its consideration to the question whether, on the record, the trial court would have been justified in determining that the crossing was "hazardous" and that signal protection was required for safety reasons. Upon review of those portions of the evidence which in its opinion were material to that question, the Court decided that such a determination would have been justified.

None of the Court's discussion and analysis of the evidence was in any way related to the fairness or reasonableness of the allocation of the cost. In the Court's view, that question—indeed, any and all questions bearing upon the allocation, including the question whether the Commission had power to consider the facts, or make any apportionment at all other than to the railroad—was wholly foreclosed by its interpretation of the provisions of the statute which it held applicable.

The decision of the State Supreme Court thus stands as a rejection of this Court's conclusions in the *Nashville* case, notwithstanding that the *Nashville* principles were restated and affirmed in the *Atchison* case. The State Court simply paid no attention to the fundamental rules established in those and other earlier cases, and instead modeled its decision in actuality, if not by intention, upon the action of the Supreme Court of Tennessee which was disapproved and reversed in the *Nashville* case.

5. Recent informed approach to the grade crossing problem.

If more recent developments or informed public opinion had cast doubt upon the correctness of the principles estab-

lished by the *Nashville* decision, the State Court might have attempted to justify its action on the ground that the situation, and hence the result, in that case were unique and of no lasting significance. The fact is, however, that critical appraisals of the grade crossing problem have clearly approved this Court's recognition of the fundamental change in the relationship between railroad and roadway traffic and its bearing upon the allocation of costs of grade-crossing improvements.

The most recent and complete study of the general problem of grade-crossing improvement and elimination is a monograph published by the Stanford Research Institute under date of May 1, 1952*. Much that is said therein is relevant to the issues here and is commended to the Court's attention. The Institute's approach is indicated by the following excerpt from the section of the monograph entitled "Allocating Costs for Grade Crossing Projects":

> "A railway-highway grade crossing provides services to motor vehicle users, the railroads, and the general public. Improvements are not provided for the sole benefit of any one of these beneficiary groups, irrespective of which group may provide direct impetus for the improvements. Each of these groups may benefit from any grade crossing improvement, depending upon the economic usage by each group of the crossing and the economic value attached to that usage. Each of the beneficiary groups has some demand for improvements, because each group attaches a value to the service rendered by the improvements. In an economic sense, all grade crossing improvements are produced under conditions of joint supply."
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**The Railway-Highway Grade Crossing Problem*, (Stanford University Press, 1952). Copies of this monograph are being furnished to the Clerk of this Court for its judicial notice.

"The relative demands of the several beneficiaries for services of grade crossing improvements and separations should determine the portion of total costs of the work to be assigned to each beneficiary group. The relative demand that each beneficiary group expresses for grade crossing improvements or eliminations may be measured by the relative value each group attaches to the services provided by the improvements. The latter must be based upon the value of the benefits each group derives from the improvements or eliminations.

"The relative demands of vehicle users, the railroads, and the general public for grade crossing improvements and eliminations are unlikely to be equal in any given circumstance. In fact, whether or not any proposed improvements to a crossing shall be made may cause conflict among the parties at interest. This arises because of diverse views with respect to economic justification of the improvements and the probability that the groups will have to be responsible for the costs of the improvements."

* * * * * * *

"The need for grade crossing improvements and elimination arises only because of the demands of the various beneficiary groups for transportation service. In order to justify such improvements from an economic standpoint, it is necessary to take into account the demands of the various groups for the improvements. Sufficiently accurate measurements of the various demands can be determined by measuring the benefits each group at interest will derive from the improvements. The relative dollar values of these economic benefits must be the basis for distribution of the costs to each group." (pp. 45-46).

The Institute dismisses the policy of assigning costs of grade crossing improvements on the basis of arbitrary percentages as unsound, saying:

"*Fixed-Percentage Basis Not Sound.*

"A policy of assigning costs for a grade crossing improvement to railroads (or to other beneficiary groups) on the basis of a fixed percentage of total costs is no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings. Economic variations relating to various grade crossings are so great that a fixed-percentage basis of cost allocation cannot be economically sound." (p. 47)

Other evidence of informed thinking on the subject is provided by the fact that Congress and a number of state legislatures have in recent years enacted statutes providing for the allocation of grade crossing improvement costs on the basis of a consideration of all the relevant factors, but frequently subject to maximum assessments on the railroads of from ten to fifty per cent.*

In a recent proceeding before the Public Utilities Commission of California, where application had been made by Marin County for the installation of special protection at three rail-highway grade-crossings, and for an allocation of costs 50% to the railroad and 50% to the County, the Commission "after a careful study of all the factors shown by the record" found that the allocation should be 75% to the County and 25% to the railroad: *Application of the County of Marin*, P.U.C. Decision No. 57894, ... P.U.C. Reports ..... (January 20, 1959).

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*Federal Aid Highway Act of 1958, 72 Stat. 885; 23 U.S.C. 101, 130(b) (10%); Ill. (variable proportions in accordance with the facts of individual cases); La. (20%); Minn. (benefits derived); Mo. (variable, up to 50%); Nebr., S. Dak., Utah, and Wyo. (variable, each case on merits); N. H., Ore. (benefits and other circumstances); Texas (10%).

Acting pursuant to the provisions of the Federal Aid Highway Act of 1958, the United States Bureau of Public Roads on October 3, 1958, issued its Policy and Procedure Memorandum No. 21-10. This memorandum confirmed and continued the provisions of General Administrative Memorandum No. 325 of the Bureau which had been issued in 1948, under the provisions of the Federal Aid Highway Act of 1944. Specifically, Memorandum No. 21-10 of the Bureau sets forth methods of determining the liability of railroads for grade crossing improvements financed in whole or in part by federal funds. So far as concerns grade crossing protection, the memorandum provides (Paragraph 5, b. (3)):

> "*Grade Crossing Protection*—This group shall include all projects for protection of existing crossings of highways and railways at grade by automatic signal devices and shall be considered as resulting in benefits to the railroad and the assigned railroad liability shall be 10 percent of the total cost of the project, whether the signal device is wholly new or modernizes or improves an existing signal device. Such projects may be either Federal-aid highway projects or Federal-aid railway-highway projects."

We do not suggest that the Bureau's allocation of a maximum of 10% of the cost, set forth in the provisions above quoted, should be controlling in the present or other like cases. The Bureau states, in Paragraph 5 a. of the memorandum, that experience has found it to be impossible to measure precisely the benefits from individual projects for the elimination of hazards of railway-highway crossings, and that many projects might be unduly delayed because of prolonged negotiations concerning benefits. Apparently the 10% formula has been evolved for general application, in order to avoid delay, and as a measure of the approximate

average benefits to the railway when a grade crossing is improved or eliminated. It has the desirable effects of avoiding delays incident to time-consuming negotiations, of permitting available funds to be employed promptly, and of furthering the interest of the motoring public in reducing delay and inconvenience at railway-highway crossings.

The Bureau's 10% formula, even though not controlling, is highly persuasive that the 100% allocation ordered by the State Supreme Court in the case at bar is wholly unfair and unreasonable. It can hardly be denied that the State Court, in interpreting the Arizona statute in requiring the railroad to bear the entire cost, has taken a position not only contrary to the reasoning and results of the *Nashville* and *Atchison* cases, but also inconsistent with the informed judgment of experts and the trend of popular thought on the subject-matter.

In addition, and in view of the substantial amounts potentially involved, as hereinafter more fully stated, the rule applied by the State Court will clearly impose undue and intolerable burdens on interstate commerce, contrary to the Commerce Clause of the Constitution and the National Transportation Policy enacted by Congress to implement that clause.*

In *King v. United States,* 344 U.S. 254, 264 (1952), this Court expressly recognized as a pressing problem in im-

*"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899 (1940).

plementing the National Transportation Policy as to the railroads, "the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficit by increasing passenger rates". The same competitive problem has also been emphasized by the Interstate Commerce Commission in connection with the diversion, particularly in recent years, of freight traffic from railroads to trucks and other carriers. *Ex Parte 168*, 276 I.C.C. 9, 46 (1949); *Ex Parte 196*, 298 I.C.C. 279, 313, 315, 320-322 (1956); *Ex Parte 202*, 298 I.C.C. 378, 381-382 (1956); *Ex Parte 212*, 302 I.C.C. 665, 674 (1958). This increasing competition, together with rising costs, has held the railroads to "sub-standard" rates of return in spite of a series of post-war rate increases. *Ex Parte 175*, 284 I.C.C. 589, 612 (1952); *Ex Parte 196, supra* (298 I.C.C., pp. 287-289; *Ex Parte 212*, ... I.C.C. ..... (mimeographed report, sheets 5, 6; Appendix, sheets 3, 7) (September 9, 1958). These conditions have caused Congressional Committees to express concern as to the "precarious financial position" of the railroads. Sub-Committee of the Senate Committee on Interstate and Foreign Commerce, *Sen. Rep. No. 1039, 82d Cong. 1st Sess.*, 46 (1951); *Report of Smathers Sub-Committee on Surface Transportation: "Problems of the Railroads"; Sen. Rep. of April 30, 1958, 85th Cong., 2d Sess.*, pp. 3, 4.

We are well aware that in the *Atchison* case this Court held that the allocation there under attack did not constitute an undue burden upon interstate commerce. The basis of this holding, however, was that the allocation was not shown to be arbitrary, unfair, or unreasonable. The Court's decision clearly indicates that if the allocation had been so arbitrary and unreasonable as to deprive the railroads of their property without due process of law, it would have been necessary also to hold that an undue burden had been

imposed upon interstate commerce (346 U.S., at p. 355). Since there is no question in the case at bar but that the allocation has been made without any consideration of the special facts and circumstances and that it is purely arbitrary, there can equally be no question but that the allocation is also an undue burden upon, and interference with, interstate commerce and thus in violation of the Commerce Clause.

6. The importance of this appeal.

The facts of this case are important because they constitute the framework upon which are woven questions arising under the Constitution of the United States. These facts are important for the further reason that they are characteristic of a development presently taking place in every part of the nation. That development is the continuing growth of automotive traffic upon the streets and roadways, the resulting demands for new highways and streets, and extensions and improvements of those already existing, and the consequent pressure for the creation of new grade crossings and the better protection of those already in use, as well as the insistent demand for eliminations of grade crossings by the construction of separations, all for the purpose of avoiding delays to automotive traffic and thus reducing its costs.

The testimony of the witnesses for the City of Tucson, before the Commission and the Superior Court, makes it clear that the flashing signals are particularly desired at this crossing so that traffic on the roadway may be able to proceed freely over the crossing, at the legal rate of speed (35 m.p.h.), at all times except when the flashing of the lights shows that appellant's trains or engines are upon or closely approaching the crossing. Motorists and truck operators will no longer have to stop or slow down in order

to "look and listen" at the crossing: for the absence of a flashing light will always be a signal to proceed at full speed. Bearing in mind that the average number of trucks and other motor vehicles using the crossing was (in 1956) 5,329 per day, or more than one hundred times the number of train movements (48 per day on the average), the importance of the time saving is apparent.

Certainly the hazard, as shown by the testimony of the City's witnesses, is relatively inconsequential: indeed, almost minimal. In 1956 there were (at the rate of 5,329 per day) a total of practically 1,960,000 vehicle movements over the crossing; yet there were only four accidents, or a ratio of one for each 490,000 vehicle movements over the crossing. On the face of this showing it is doubtful whether the presence of the flashing lights will materially reduce the accident frequency; but there is no doubt at all that delays to traffic using the crossing will be greatly reduced. Thus the real and controlling reason for the protection at Cherry Avenue is to eliminate delay and interference to motor vehicle traffic and to enable that traffic to move at reduced expense.

Each year the Interstate Commerce Commission issues a Report on Transport Statistics which is compiled from data furnished pursuant to law by the individual railroads. This Annual Report shows, among other things, the number of railway-highway grade crossings in each state, both in total, and by groups according to the type of protection maintained. The 71st such Annual Report, covering the year ending December 31, 1957, shows (at p. 11) that on December 31, 1957, there were 850 such grade crossings in Arizona. 85 of this number had special protection, such as watchmen, crossing gates, or automatic lights or audible signals (or both). The remainder, totaling 765, were protected by standard fixed signs or other special signs or

barriers. Appellant's own Report to the Interstate Commerce Commission, for 1957, from which the Commission's tabulation for the State of Arizona was in part compiled, showed that on December 31, 1957, there were 605 railway-highway grade crossings upon appellant's lines in Arizona. Sixty-five of these crossings were specially protected, by watchmen or automatic devices, while 540 were protected by standard or special fixed signs or barriers.

The cost of the Cherry Avenue protection was estimated in 1956 to be slightly more than $15,000. On this basis the potential exposure of the Arizona railroads, resulting from the final judgment of the State Supreme Court, is in the neighborhood of $11,500,000. Appellant's own potential exposure is about $8,100,000. The results of the State Court's reversion to the reasoning adopted and followed by the Supreme Court of Tennessee in the *Nashville* case, and its rejection of the principles of that case and the *Atchison* case thus assume substantial importance, for they threaten to involve the arbitrary imposition, upon appellant and the other Arizona railroads, of expenditures which may amount to several millions of dollars.

CONCLUSION

At the risk of stating what may be obvious, we here emphasize that this appeal does not involve any question of the desirability of the special protection at the South Cherry Avenue crossing, nor constitute any attempt to prevent or delay that installation. While appellant has contended that the so-called "hazard" at the crossing is not such as to justify the protection, appellant does not deny that the improvement will be of substantial benefit to the motoring public using the crossing, as a means of avoiding interference and delay.

Appellant contends simply that such benefits, and all other relevant circumstances, should be taken into consideration so that the expense of the improvement may be allocated fairly and reasonably, in accordance with the principles of the *Nashville* and *Atchison* cases.

The broad question here is therefore whether these two decisions of this Court are to be disregarded and cast aside; for there can be no question but that the decision of the State Court herein is directly in conflict with the *Nashville* case, and because of the approval and affirmance of that case in the *Atchison* opinion, directly in conflict with the latter decision also.

It is submitted that the appellate jurisdiction of this Court has been duly invoked; that the federal questions involved are substantial in merit, and of outstanding public importance; and that this Court's consideration of this appeal upon full briefs and arguments is therefore appropriate and essential.

Respectfully,

GEORGE L. BULAND
BURTON MASON
RANDOLPH KARR
Attorneys for Appellant

Of Counsel:
JOSEPH S. JENCKES, JR.
EARL H. CARROLL

Dated March 9, 1959.

(Appendices Follow)

Appendix A

(84 Ariz. 365, 329 P.2d 883; Sept. 24, 1958).

In the Supreme Court of the State of Arizona

Southern Pacific Company, a corporation,
Appellant.

vs.

The Corporation Commission of Arizona, and William T. Brooks, John H. Barry and Mit Simms, as members of and comprising said Commission,
Appellees,

and

The City of Tucson,
Intervenor-Appellee.

No. 6510

Appeal from Superior Court of Maricopa County
Honorable Fred J. Hyder, Judge—Judgment Affirmed

Evans, Kitchel & Jenckes and Jos. S. Jenckes, Jr. and Earl H. Carroll, Phoenix—*Attorneys for Appellant*

Robert Morrison, Attorney General—*Attorney for Appellees*

Harold R. Newbauer, City Attorney Tucson—*Attorney for Intervenor-Appellee*

Phelps, Justice.

The Southern Pacific Company, a railroad corporation, appeals from a judgment which affirms an order of the Corporation Commission directing Southern Pacific to install at its sole expense two electrically operated flashing warning signals to warn automobile traffic of approaching trains at its South Cherry Avenue railroad crossing in the city of

Tucson. The Commission entered its order on petition by the city of Tucson after a hearing at which both Tucson and Southern Pacific presented evidence.

Southern Pacific commenced this action in the superior court under the provisions of A.R.S. § 40-254 and the court permitted Tucson to intervene in defense of the Commission's order. Under subdivision E of A.R.S. § 40-254 the burden of proof at the trial rested upon Southern Pacific to show by clear and satisfactory evidence that the order of the Commission is unreasonable or unlawful. At the trial the court, by stipulation of the parties, admitted in evidence the record of the proceedings before the Commission—transcript of testimony and exhibits. Southern Pacific allowed its case to rest entirely on the matters contained in that record and offered no further evidence. Tucson offered one witness primarily for the purpose of explaining and offering into evidence three photographs of the South Cherry Avenue crossing which had not been previously offered at the hearing before the Commission.

In its appeal to this court Southern Pacific contends that the trial court erred in affirming the Commission's order because: (1) the South Cherry Avenue crossing does not create a hazardous condition dangerous to the health and safety of the public; (2) the hazard, if any, at the crossing does not result from acts of the Southern Pacific Company; (3) the Commission did not apportion the cost of the protective devices under the provisions of A.R.S. § 40-337; and (4) an interpretation of A.R.S. §§ 40-336 and 40-337 which places the entire cost of crossing protection on the railroad without reference to the reasonableness thereof makes them unconstitutional and creates an unreasonable burden on interstate commerce.

We held in Maricopa County v. Corporation Commission, 79 Ariz. 307, 289 P.2d 183, that § 69-228 A.C.A. 1939, (now

A.R.S. § 40-336) places the burden of paying the cost of protective devices exclusively upon the railroad company and that the apportioning of costs provisions of § 69-229, A.C.A. 1939, (now A.R.S. § 40-337) have no application to the installation of protective signalling devices at existing grade crossings. In Southern Pacific Co. v. Corporation Commission, 83 Ariz. 333, 321 P.2d 224, we held that an interpretation of our statutes which imposes the entire cost of signalling devices upon the railroad is not unconstitutional either as a denial of due process of law or as an unreasonable burden on interstate commerce. The rule laid down in Atchison, Topeka & S. F. R. Co. v. Public Util. Com., 346 US 346, 98 L ed 51, in no way conflicts with that view. The matter as to whether such costs shall be apportioned or placed solely upon the railroad is purely legislative. Therefore, we must affirm the trial court's judgment if the evidence conflicts or if substantial evidence supports its judgment. Kauzlarich v. Board of Trustees, 78 Ariz. 267, 278 P.2d 888. Or if, under this rule, the evidence in this case justifies a determination by the trial court that the Commission's order was not unreasonable or unlawful, we must affirm the trial court's judgment.

At the hearing the Commission received the following evidence: according to a one-week traffic count taken in May of 1956, an average of 5,329 vehicles passed over the South Cherry Avenue crossing in each 24-hour period with a high of 6,041 on Friday and a low of 3,341 on Sunday. According to an estimate made by Southern Pacific Company employees the train movements over the South Cherry Avenue crossing in a 24-hour period consist of 8 passenger trains, between 23 and 35 freight trains, and 8 to 13 switching movements—a potential total of 56 train movements a day over the crossing. Two main tracks, one eastbound and one westbound, and one spur track intersect South Cherry Ave-

nue at an angle of approximately 53 to 54 degrees to form the South Cherry Avenue crossing. One accident occurred at this crossing in each of the years 1951, 1952 and 1953; none occurred in 1954; two, in 1955; and four accidents occurred at the crossing up to June 7 in 1956. An automobile may legally travel at 35 miles per hour over the crossing. The Southern Pacific Company voluntarily orders its employees to limit train speeds over the crossing to 20 miles per hour. At a position on the street 100 feet north of the crossing, buildings limit a driver's sight distance to 180 feet east along the railroad tracks, and 213 feet west along the railroad tracks.

At the trial the court received evidence that at a position on the street 100 feet south of the crossing a building limits a driver's sight distance to 200 feet west along the railroad tracks.

The evidence before the trial court justified a determination by it that the South Cherry Avenue crossing is a hazardous crossing and that the public health and safety requires the protection of electrically operated flashing warning signals at the crossing. The evidence does not brand the Commission's order as unreasonable. Thus substantial evidence supports the judgment and we must affirm it unless the Commission's order is otherwise unlawful.

The fact that the buildings which limit the driver's sight distance are not railroad buildings on railroad land is immaterial. See Eckert v. Perth Amboy & W. R. Co., 66 N.J. Eq. 437, 57 Atl. 438. Where health or safety requires it, the Commission may order the railroad to install appropriate safety devices. A.R.S. § 40-336. Nothing in our statutes limits this power to instances where only factors controlled by the railroad have contributed to the hazardous nature of the crossing.

This answers all the contentions made by Southern Pacific supporting their one assignment of error. None of the reasons brand the Commission's order as unlawful. The evidence of Southern Pacific has not proved the Commission's order to be unlawful or unreasonable. We affirm the judgment of the trial court because substantial evidence supports it.

Judgment affirmed.

H. T. PHELPS
Justice

Concurring:

LEVY S. UDALL
Chief Justice

DUDLEY W. WINDES
Justice

FRED C. STRUCKMEYER, JR.
Justice

J. MERCER JOHNSON
Justice

Appendix B

In the Superior Court of the State of Arizona
in and for the County of Maricopa

Southern Pacific Company, a corporation, *Plaintiff*, vs. The Corporation Commission of Arizona, and William T. Brooks, John H. Barry and Mit Simms, as members of and comprising said Commission, *Defendants*, and The City of Tucson, *Intervenor*.	No. 90686

JUDGMENT

This matter came on regularly for trial before this Court, sitting without a jury, evidence having been adduced on behalf of the Plaintiff's complaint and on behalf of both the Defendants and the Defendant-Intervenor, and the Court having considered all matters and things concerned in said action, and having granted the parties hereto time to file briefs and having thereafter taken the matters under advisement, now therefore, all things in the premises having been fully considered,

It Is Ordered, Adjudged and Decreed

that the order of the Corporation Commission Decision No. 29784 be, and the same is hereby affirmed.

Done in open court this 22 day of April, 1957.

/s/ Fred J. Hyder
Judge

Appendix C

Before the Arizona Corporation Commission

In the Matter of the Application of the City of Tucson for an Order Requiring Southern Pacific Company to Install Automatic Flashing Lights at South Cherry Avenue Grade Crossing in the City of Tucson.	Docket No. R-11379 Decision No. 29784

Before— William T. Brooks, Chairman

Appearances—For Applicant—Harold Neubauer, City Attorney City of Tucson, Arizona

In Opposition—Earl H. Carroll and William Scanland on behalf of The Southern Pacific Company

OPINION AND ORDER

The above matter was heard by the Commission on June 15, 1956, at Tucson, Arizona, pursuant to notice.

The Commission is of the opinion, after a review of the evidence presented, that the installation of flashing lights as hereinafter ordered will promote and safeguard the health and safety of the Southern Pacific Company's employees, passengers, customers and the public, and the Commission being fully advised in the premises,

Now, Therefore, It Is Ordered (1) that Southern Pacific Company shall construct and maintain two (2) electrically operated flashing warning signals of the type presently in use at railroad highway crossings: one such signal to be constructed on each side of the railroad tracks facing ap-

proaching traffic. (2) The construction and maintenance of the signals to be at the sole expense of the Southern Pacific Company. (3) The construction of such signals is to be commenced within a reasonable time, and said construction is to be in compliance with the Commission's Decision No. 16783, dated October 24, 1946.

By Order of the Arizona Corporation Commission.

In Witness Whereof, I, MEL D. MICHAEL, Secretary of the Arizona Corporation Commission, have hereunto set my hand and affixed the official seal of this Commission, at the Capitol, in the City of Phoenix, this 20th day of July, 1956.

/s/ MEL D. MICHAEL
Secretary

Appendix D

Before the Arizona Corporation Commission

In the Matter of the Application of the City of Tucson for an Order Requiring Southern Pacific Company to Install Automatic Flashing Lights at South Cherry Avenue Grade Crossing in the City of Tucson.	Docket No. R-11379 Decision No. 29842

Before— William T. Brooks, Chairman

Appearances—For Applicant—Harold Neubauer, City Attorney City of Tucson, Arizona

In Opposition—Earl H. Carroll and William Scanland on behalf of the Southern Pacific Company

AMENDED OPINION AND ORDER

The above entitled proceeding was heard at Tucson, Arizona on June 15, 1956, pursuant to notice. On July 20, 1956, an opinion and order, Decision No. 29784, was entered requiring the Southern Pacific Company hereinafter referred to as the railroad, to erect and maintain at its sole expense protective flashing lights at the point where South Cherry Avenue crosses the tracks and right-of-way of the railroad. On August 3, 1956, the railroad filed a petition for rehearing herein. The petition for rehearing raises no new issues or offers no new or additional evidence which would result in a different conclusion. The petition of the railroad for rehearing will be ordered denied.

On July 24, 1956, by letter and on August 8 by formal petition, denominated a petition for rehearing, the City of Tucson requested amendment of Decision No. 29784 so as to include therein a finding of public convenience and necessity and the establishment of a grade crossing ninety-five feet in width at the point where South Cherry Avenue crosses the line and right-of-way of the railroad. The complaint requested the establishment of such grade crossing because there is no evidence that an easement has been granted to the city of Tucson by the railroad or that the Corporation Commission had ever authorized the establishment of said grade crossing. Authorization for the establishment of said grade crossing was omitted from Decision No. 29784.

The pleadings and evidence show definitely the said grade crossing has been used by the public since 1925; that the crossing is now used by more than three thousand vehicles per twenty-four hour period, and that the street approaches to said grade-crossing and the grade crossing itself is paved to a width of sixty-four feet. There is no evidence to dispute that of the city of Tucson that the public convenience and necessity requires a grade-crossing at the point above described ninety-five feet in width.

The long continued use of such grade crossing by the public is evidence of public convenience and necessity sufficient for the Commission to recognize the existence thereof and authorize its establishment as a grade crossing at this time.

The Commission is of the opinion, after a review of the evidence presented, that the installation of flashing lights as hereinafter ordered will promote and safeguard the health and safety of the Southern Pacific Company's employees, passengers, customers and the public, and the Commission being fully advised in the premises,

NOW, THEREFORE, IT IS ORDERED: (1) that the petition for rehearing filed by the Southern Pacific Company herein be and the same is hereby denied. (2) that the Southern Pacific Company shall construct and maintain at its sole expense two electrically operated flashing warning signals on each side of said grade-crossing facing oncoming traffic. (3) the construction of such signals is to be commenced within a reasonable time, and said construction is to be in compliance with the Commission's Decision No. 16783, dated October 24, 1946. (4) a grade crossing is ordered established at South Cherry Avenue as described. (5) this amended order shall become effective September 10, 1956.

By Order of the Arizona Corporation Commission

In Witness Whereof, I, MEL D. MICHAEL, Secretary of the Arizona Corporation Commission, have hereunto set my hand and affixed the official seal of this Commission, at the Capitol, in the City of Phoenix, this 6th day of September, 1956.

MEL D. MICHAEL
Secretary

/s/ By BELLE J. LUND,
Ass't Secy

s/ WILLIAM T. BROOKS
Chairman

s/ JOHN H. BARRY
Commissioner

Appendix E

(79 Ariz. 307, 289 P.2d 183; Oct. 31, 1955).

Maricopa County, *Appellant*,

v.

The Corporation Commission of Arizona, Wilson T. Wright, Mit Simms, and William T. Brooks, constituting Members of said Commission, *Appellees*.

No. 6061.

Supreme Court of Arizona—Oct. 31, 1955—
Rehearing Denied Nov. 29, 1955.

Proceeding before Arizona Corporation Commission, in which commission entered order requiring railroad to install signal devices at certain crossing, but conditioned requirement upon county's paying railroad 50% of construction cost. The County appealed. The Superior Court, Maricopa County, Charles C. Bernstein, J., entered judgment requiring the county to pay to the railroad the sum of $4,000 as one half of construction cost. The county again appealed. The Supreme Court, Phelps, J., held that the commission could not condition its order requiring railroad to install flashing warning signals at certain crossing, upon payment by county of 50% of the construction cost, since statute expressly imposes exclusive duty upon railroad to install and maintain such signal devices, and necessarily to bear expenses thereof.

Judgment reversed.

Wm. P. Mahoney, Jr., County Atty., John F. Connor, Chief Deputy Co. Atty., Phoenix, Lewis, Roca, Scoville & Beauchamp, by John P. Frank, Phoenix, for appellant.

Robert Morrison, Atty. Gen., Don Corbitt, Spec. Asst. Atty. Gen., Evans, Hull, Kitchel & Jenckes, Phoenix, by Earl H. Carroll, Phoenix, of counsel, for appellees.

PHELPS, Justice.

The Arizona Corporation Commission, at a public hearing, entered an order on May 29, 1953, requiring the Southern Pacific Company to construct a flashing signal device at the intersection of the Southern Pacific Company's tracks and Alma School Road near Mesa, Arizona, at such time as Maricopa County should agree to pay 50% of the cost of construction.

In its order of May 29, 1953, the commission found that there existed at the Alma School Road highway crossing over and across the Southern Pacific Company's tracks, "a hazardous condition dangerous to the health and safety of the public," and that therefore "it is necessary to install and maintain at this crossing two electrically operated flashing warning signals of the type presently in use at railroad highway crossings."

The commission thereupon found, in addition, that the installation of these devices would "benefit the Southern Pacific Company and Maricopa County in equal proportions" and it ordered the Southern Pacific Company to construct the device "at such time as the county of Maricopa shall execute an agreement with said railroad to pay 50% of the cost of construction of said device upon completion thereof."

Maricopa County applied for a rehearing on the ground that the commission had no jurisdiction to condition its order upon the payment by Maricopa County of 50% of the cost, and this motion was heard and denied.

The county appealed from the order of the commission to the superior court on the ground that the order of the

commission amounted to a direction to the county to pay 50% of the cost of the saf[illegible]y device and that such an order was beyond the powers of the commission.

The court found (1) that the application for rehearing made by the county to the commission was within the time required by law; (2) that the crossing was "a hazardous condition dangerous to the health and safety of the public"; (3) that the warning signals were necessary; (4) that the installation of the device would benefit the railroad and Maricopa County in equal proportions and that the cost of constructing this was $8,000; (5) "that the commission had authority to apportion the cost of said crossing protection between the Southern Pacific Company and Maricopa County", and the apportionment by the commission was not arbitrary or unreasonable, and, (6) that:

> "Because of the immediate need of crossing protection at the Alma School Road crossing and because of the long delay occasioned by Maricopa County's refusal to enter into an agreement with Southern Pacific Company to share the cost of said installation, Decision No. 27676 should be modified to provide that Maricopa County pay to Southern Pacific Company forthwith, the sum of $4,000.00 as and for its half of the cost of said crossing protection."

The court entered judgment accordingly from which this appeal was taken.

The commission contends that the complaint filed in the superior court denominated by the county as an appeal from the order and decision of the commission was not filed within the time prescribed by law and that its motion for rehearing before the commission was likewise not filed within the period prescribed by law and that it did not succeed in vesting the superior court with jurisdiction to hear the matter and that the order and decision of the commission was therefore final.

These questions were raised by appellee on cross-assignments of error without cross-appealing from the judgment of the trial court by giving notice of appeal. The county takes the position that under the provisions of sections 21-1801—21-1803, A.C.A. 1939, the commission was required to give notice of appeal in order to have this court consider its cross-assignments of error.

Under the facts and circumstances of the instant case we agree with this view. An examination of the authorities on this point leads us to the conclusion that the correct rule under such circumstances is that if appellee in its brief seeks only to support or defend and uphold the judgment of the lower court from which the opposing party appeals, a cross-appeal is not necessary. Gillespie Land & Irrigation Co. v. Jones, 63 Ariz. 535, 164 P.2d 456, 4 C.J.S., Appeal and Error, § 1299. If, however, it is sought by such cross-assignments to attack said judgment with a view either of "enlarging his own rights thereunder or of lessening the rights of his adversary" he must cross-appeal by conforming with the rules of court by giving notice of appeal. United States v. American Ry. Express Co., 265 U.S. 425, 435, 44 S.Ct. 560, 564, 68 L.Ed. 1087. In the absence of a cross-appeal the appellee can defend only as to the items allowed below and cannot present rejected claims. This question is discussed in the forthcoming Volume 7 of Moore's Federal Practice under Rule 72.05, Necessity for Cross-Appeals, pages 3010 et seq.

In the case of United States v. American Ry. Express Co., supra, Justice Brandeis, writing the opinion for the court, said:

> "• • • a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not

attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

To the same effect is Le Tulle v. Scofield, 308 U.S. 415, 60 S.Ct. 313, 84 L.Ed. 355.

In the instant case it is clear that the commission, appellee herein, sought to have the judgment of the trial court set aside upon the ground that the court had never acquired jurisdiction either of the parties or of the subject matter of the cause of action because Maricopa County had neither filed its motion for rehearing before the commission nor its notice of appeal to the superior court from the order and decision of the commission within the time prescribed by statute. It is equally clear, if we apply the rule above enunciated with respect to cross-appeals, it was necessary for appellee to cross-appeal by giving notice of appeal.

It is the contention of the county that the order and decision of the commission is null and void for the reason that under the provisions of section 69-228, A.C.A. 1939, the duty is expressly placed upon the Southern Pacific Company to install and maintain its signal devices and necessarily to bear the expenses thereof and that it therefore exceeded its authority and jurisdiction in making its order and decision operative only after the county should agree to bear one-half the expenses thereof.

Section 69-228, supra, reads as follows:

"*Safety devices, commission may order.*—The commission may by order, rule or regulation, require every public service corporation to maintain and operate its line, plant, system, equipment, and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public, and to this end may prescribe the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signalling, establish uniform or other standards of equipment, and require the performance of any other act which health or safety may demand."

We are of the view that the installation of signal devices by the Southern Pacific Company is placed squarely and exclusively upon the shoulders of that company by the provisions of section 69-228, supra. The commission is therein given authority to order the railroad company to install, use, maintain, and operate appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings and junctions and block or other system of signalling. This authority inescapably carries with it the implied duty of the railroad company to bear all expenses incident thereto. We find no difficulty whatever in holding that the above-quoted statute is the provision applicable in the instant case and that it was the intent of the legislature to fix the burden exclusively upon the railroad company.

The commission contends that they had the authority to make the order in question under the provisions of section 69-229, A.C.A. 1939, which insofar as here applicable, reads as follows:

"*Crossings, powers of commission over.*—No public highway or street shall hereafter be constructed across

the track of any railroad at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad at grade, without having first secured the permission of the commission; provided, that this shall not apply to the replacement of lawfully existing tracks. The commission may refuse its permission or grant it upon such terms and conditions as it may prescribe. The commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each of such crossings and to alter or abolish any such crossings; to prescribe the terms upon which and the proportions in which the expense of the *alteration or abolition of such crossing shall be divided between the parties affected or in interest.* * * *" (Emphasis supplied.)

An examination of this section clearly indicates to us that it has no application to the question here involved. In the first place, it forbids the construction of highways and streets thereafter constructed across the track of a railroad at grades without having first secured the permission of the commission and giving to the commission the exclusive power to determine and prescribe the manner, including the *particular points of crossing* and the terms of installation, operation, maintenance, use and protection of such crossings and to alter or abolish any such crossings. It then provides that the commission further has power "to prescribe the terms upon which and the proportions in which the expense of the *alteration or abolition of such crossing* shall be divided between the parties affected or in interest." (Emphasis supplied.) All the authorities we have examined hold that the legislature under its police power has the power to fix the expenses of construction of such crossings upon either one or upon all of the parties in

interest. It will be observed, however, that the legislature in the above statute expressly limited the proportionment of the expenses between the parties affected or in interest to *"the alteration or abolition of such crossings."* There is no provision or no inference to be drawn from the language therein used that would justify the imposition of any portion of the expense of the installation and maintenance of signalling devices by the railroad company upon anyone else other than the public service corporation.

Therefore neither section 69-228, supra, nor section 69-229, supra, give the commission any authority to proportion the expenses of constructing a flashing signal device at the Alma School crossing between the railroad company and Maricopa County. Upon finding that the crossing in question created a hazardous condition dangerous to the health and safety of the public, it became the mandatory duty of the commission to order the railroad company to install forthwith such signalling device.

Inasmuch as the commission had no authority to apportion the expense of installing a signalling device at the Alma School Road crossing between the Southern Pacific Company and Maricopa County the judgment of the trial court decreeing that Maricopa County should pay to the Southern Pacific Company the sum of $4,000 as and for its proportion of the expense of constructing the signal device in question was null and void. The court was further without authority under any set of circumstances to do more than to affirm, modify or set aside the order and decision of the commission as expressly provided by the provisions of section 69-249, A.C.A. 1939. The court exercised neither of the powers granted it under said section but undertook to render an entirely new judgment. This in itself renders the judgment null and void.

We have carefully read every case cited by both plaintiff and defendant and because of the basic differences in the statutes of other states regulating railroad crossings, and our own statute, they gave us but little aid in the premises.

Judgment reversed.

LA PRADE, C. J. UDALL and WINDES, JJ., and J. SMITH GIBBONS, Superior Court Judge.

FRED C. STRUCKMEYER, JR., J., having disqualified himself, the Honorable J. SMITH GIBBONS, Judge of the Superior Court, Apache County, Arizona, was called to sit in his place.

Appendix F

(83 Ariz. 333, 321 P.2d 224; Feb. 5, 1958).

Southern Pacific Company, a corporation, *Appellant*,

v.

The Corporation Commission of Arizona, *Appellee*,

and

Maricopa County, *Intervenor-Appellee*.

No. 6274.

Supreme Court of Arizona—Feb. 5, 1958.

Proceedings to review Corporation Commission's order which directed railroad company to install signalling devices at road crossings at railroad company's sole expense. The Superior Court of Maricopa County, R. C. Stanford, Jr., J., dismissed and railroad appealed. The Supreme Court, Windes, J., held that where Corporation Commission had found that crossing was hazardous and ordered railroad to install warning signals at such time as county would agree to pay 50% of cost, and Supreme Court, on appeal, made determination that Commission could not legally condition its order for installation upon payment by county of one-half of cost, railroad was entitled, after three years time had elapsed, to a hearing before Commission on allegation that conditions had so changed that there no longer existed a substantially hazardous condition dangerous to public health and safety and Commission could not, without notice, on basis of record made three years previously, enter second order directing railroad to install signalling devices at its sole expense.

Judgment reversed with instructions.

Evans, Kitchel & Jenckes, and Earl H. Carroll, Phoenix, for appellant.

Robert Morrison, Atty. Gen., and A. Michael Bernstein, Asst. to Atty. Gen., for appellee.

William P. Mahoney, Jr., County Atty., and John F. Conner, Chief Deputy, County Atty., Lewis, Roca, Scoville & Beauchamp, and John P. Frank, Phoenix, for intervenor-appellee.

WINDES, Justice.

In May, 1953, the appellee, the Corporation Commission of Arizona, pursuant to hearing found that where the Alma School road crossed the tracks of the appellant Southern Pacific Company, there existed a hazardous condition which was dangerous to the health and safety of the public and that it was necessary to install and maintain at the crossing two electrically operated flashing warning signals. The commission also found that these warning signals would benefit the company and Maricopa county in equal proportions and ordered the company to install the same at such time as the county would agree to pay 50 percent of the cost. The county pursuant to the procedure provided by statute contested the validity of this order. The matter came to this court and we held that under the provisions of either section 69-228 or section 69-229, A.C.A. 1939 (now A.R.S., sections 40-336 and 40-337) the commission could not legally condition its order for installation upon the payment by the county of one-half the cost and that when a hazardous condition dangerous to the health and safety of the public was found to exist, it was the duty of the commission to require the installation of the proper signalling devices at the sole cost of the company. Maricopa County v. Corpora-

tion Commission of Arizona, 79 Ariz. 307, 289 P.2d 183. Subsequent to this court's decision and mandate the trial court on December 1, 1955, set aside the commission's order.

On December 27, 1955, the commission without notice to the company entered an order directing it to install the signalling devices at its sole expense. The company filed a petition requesting revision of the order or in the alternative a rehearing which petition was denied. This action followed, pursuant to the provisions of section 40-254, A.R.S., seeking to set aside the order of December 27th. In the verified complaint it is alleged that the order of December 27, 1955, was based on a hearing held in May 1953, and that in the interim the physical condition of the crossing and the adjoining property and the manner of operation of the company's trains over the crossing had materially changed to the extent that a substantially hazardous condition dangerous to the health and safety of the public does not now exist. It is further alleged that the hazard created at the time of establishing the crossing was not sufficient to justify the imposition on the company of the entire cost; that if the hazard is now sufficient to warrant the signals, it was created by the erection of improvements over which the company has no control and by the extent of traffic on the road; that the installation will be of substantial benefit to the public and nearby property owners and of little benefit to the company; and that the imposition of the entire cost upon the company was arbitrary, capricious, unreasonable and inequitable, contravenes certain statutory and state and federal constitutional provisions and will confiscate the company's property without due process of law.

Maricopa county sought and secured permission to intervene. The county and the commission filed motions to dismiss for the reasons that no claim for relief was stated and

that the matters set forth had been adjudicated. These motions were granted and this appeal follows.

In the complaint request was made that the order of the commission be suspended pending the action and that the commission be enjoined from recovering any fines or penalties in the meantime. Pursuant to an order to show cause a hearing was had on this request and the relief was denied. The notice of appeal is only from the final judgment. The company seeks to test in this court the validity of the denial of injunctive relief. When the matter reached this court there was filed a motion to dismiss the appeal upon the ground the matter was moot, supported by affidavit that the company had installed the signals. We refused to dismiss the appeal feeling that the company still had the right to contest the validity of the order since if valid it required continuous maintenance of the installation. We believe, however, that compliance with the order pending litigation eliminates any necessity of determining the legality of the court's action in denying the injunction pendente lite.

From the memorandum opinion filed giving the reasons for dismissing the company's complaint it appears the trial court's view was that because counsel for the company participated with the attorney general in the handling of the case of Maricopa County v. Corporation Commission, supra, the company was bound by the judgment in that case even though it was not a named party and that case was res judicata as to the questions herein presented. Assuming without deciding that the court was correct in ruling that the company was in legal effect a party in the first case, yet we do not believe the res judicata rule bars it from testing the validity of this judgment.

When the Maricopa County case was reversed and subsequent thereto the trial court vacated the first order of the commission, the subject matter remained pending for deci-

sion by the commission in accordance with the law announced by this court. It remained pending as though no order had been made. From language used by this court the commission apparently believed the only legal action it could take was to enter the second order without notice upon the basis of the record made nearly three years previously without the consideration of anything that might have happended in the interim. In this the commission was in error. Certainly, there could be no relitigation of the same order that was tested in the first case, but when after reversal a new and different decision is rendered in the same proceeding which materially and adversely affects a party, he is not barred from questioning the validity of the second decision on some ground that never existed in the first case. The complaint alleges that the new order was made without notice and that conditions in the meantime had so changed to the extent that there no longer existed a substantially hazardous condition dangerous to public health and safety. If this in fact be true, the second order would be unreasonable and should be vacated. Certainly this question was not and could not have been litigated in the first case. Res judicata has no effect upon it. Due process of law demands that the company be given a hearing on this question.

The company contends that any order of the commission of the nature involved herein must be reasonable to avoid transgressing constitutional rights. Generally this is correct. Should the commission make such an order when in fact there was no reasonable necessity for public safety or would require protective devices at excessive costs when it appeared that some other less costly device would equally serve the purpose, probably such order would come within the area of unreasonableness. The motion for rehearing before the commission and the complaint having alleged

facts which, if true, would render the second order not reasonably necessary for public protection, due process of law requires that the company be given the opportunity to prove if it can by clear and satisfactory evidence that the second order was unreasonable in this respect.

The company contends that if our interpretation of section 69-228, supra, be correct, the section is unconstitutional, the theory being that the legislature cannot impose the entire cost of signalling devices upon the company for the reason that to do so would be unreasonable and especially so since the commission has found that the company and Maricopa county would benefit in equal proportions and that it was reasonable and equitable under the circumstances that each pay half the cost. The mere fact the statute imposes the entire cost upon the company does not infringe upon constitutional rights. The police power of the state may be so exercised. Erie R. Co. v. Board of Public Utility Com'rs, 254 U.S. 394, 41 S.Ct. 169, 65 L.Ed. 322; Missouri Pacific Ry. Co. v. City of Omaha, 235 U.S. 121, 35 S.Ct. 82, 59 L.Ed. 157; Atchison, T. & S. F. Ry. Co. v. Public U. Commission, 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed. 51. Much emphasis is placed upon the proposition that since the commission found that the county received equal benefits and it is reasonable that it contribute equally to the costs, the order by reason of this finding is ipso facto unreasonable and thereby drawn into the sphere of unconstitutional law. We are not impressed with this argument when the statute gives the commission no power to allocate a portion of the costs to the county. When because of local conditions public safety requires certain safety measures, the relative benefit to the public and the railroad company is neither a circumstance nor a factor to be considered in determining the reasonableness of the order. The reasonableness of the cost or the character of the device required is not questioned.

Under such circumstances when the commission has legally found that the hazards at the crossing create the degree of danger that safety measures are required to adequately protect the health and safety of the public, it should require reasonable protective measures at the cost of the company irrespective of the relative benefit accruing to the public. The statute in effect says that under such conditions it is reasonable to require the company to pay all and the commission cannot find to the contrary. The controlling factors are local safety and necessity. We concur in the principles stated in Borough of Sayreville v. Pennsylvania R. Co., 44 N.J.Super. 172, 129 A.2d 895, pending on certification to New Jersey Supreme Court, 24 N.J. 222, 131 A.2d 586; Atchison, T. & S. F. Ry. Co. v. Public U. Commission, supra.

The contention is made that a statute placing the entire cost on the railroad offends the commerce clause of the federal constitution. There is no merit to the contention. Erie R. Co. v. Board of Public Utility Com'rs, supra.

Since the company is entitled to its day in court on the question of whether in fact at the time of the second order there was a hazardous condition that reasonably necessitated the requirement of safety signals for public protection, the case must be reversed with instructions to reinstate the complaint, and allow the company to prove, if possible, by clear and satisfactory evidence that there was no such hazard. If such proof be not submitted, the commission's action should be affirmed.

Judgment reversed.

UDALL, C. J., and PHELPS, STRUCKMEYER and JOHNSON, JJ., concur.

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM 1958

No. 768

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

THE CORPORATION COMMISSION OF ARIZONA and WILLIAM T. BROOKS, JOHN H. BARRY and MIT SIMMS, as members of and comprising said Commission, and THE CITY OF TUCSON, a municipal corporation,
Appellees.

On Appeal from the Supreme Court of the State of Arizona

MOTION TO DISMISS

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Dated: April 3, 1959

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